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No. 84-759.

Supreme Court, U.S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

ROBERT WAGMAN,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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Questions Presented.

1. Did the court below err in holding that it was harmless error for the District Court to permit the prosecutor to inform the jury falsely that defense counsel had violated important "rules of the game" and had concocted petitioner's defense only after the jury was seated?

2. Did the court below err in applying the harmless error standard for non-constitutional rather than constitutional error, where the prosecutor's comments to the jury impugned defense counsel's integrity, undercut the core of petitioner's defense, and thereby deprived petitioner of his Sixth Amendment rights to counsel and to a fair trial?

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Opinion Below.

The opinion of the Court of Appeals for the Third Circuit is as yet unreported, and is reproduced beginning at page 1a of the Appendix to this Petition (App.A, pp. 1a-4a).

Jurisdiction.

The judgment of the Court of Appeals was entered on August 31, 1984, and a timely Petition for Rehearing and Suggestion for Rehearing In Banc were denied on October 4, 1984 (A. 5a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) (1976).

Constitutional and Statutory Provisions Involved.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rules of Criminal Procedure 12.2, in effect July 28, 1983, provided:

> **Rule 12.2 Notice of Defense Based upon Mental Condition**
>
> **(a) Defense of Insanity.** If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may

direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Mental Disease or Defect Inconsistent with the Mental Element Required for the Offense Charged. If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Psychiatric Examination. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivi-

sion (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state.
Added Apr. 22, 1974, eff. Dec. 1, 1975, and amended July 31, 1975, Pub. L. 94-64, § 3(14), 89 Stat. 373.

Parties Below.

The other party to the proceedings in the District Court was Phairat Ratanakakornklai. He did not appeal his judgment or sentence to the Court of Appeals.

Statement of the Case.

1. *Introduction.*

Petitioner Robert Wagman was convicted after a trial by jury on three counts of an indictment charging conspiracy to import heroin, importation of heroin and attempted possession of heroin with intent to distribute. He was sentenced to a five-year term of imprisonment to be followed by three years of special parole and five years probation, and to pay fines totalling $75,000.

The sole factual issue in dispute at trial was whether Petitioner, who had been asked by a business associate to pick up a suitcase that had been brought from Hong Kong, *knew* that the suitcase contained heroin. The only evidence of Petitioner's knowledge was a series of questionable and inconsistent admissions made around the time of Petitioner's arrest. To rebut this evidence, Petitioner introduced the testimony of three expert witnesses, who corroborated his testimony that the "confessions" were falsely made due to a long-standing personality disorder which caused Petitioner to become so anxious that he said whatever the arresting agents wanted to hear.

Because the prosecutor was permitted, in closing, to misadvise the jury that defense counsel had violated Fed.R.Crim.P. 12.2 and had concocted Petitioner's defense only after the jury was seated, Petitioner was robbed of his Sixth Amendment rights to counsel and to a fair trial. The Court of Appeals mistakenly mischaracterized and trivialized the error; moreover, the court mistakenly applied the harmless error standard for non-constitutional rather than constitutional error.

2. *Facts.*

When Petitioner was 13, he was attacked and brutally beaten by a gang of ten older and bigger boys. They surrounded him, took him to a church gymnasium, and passed him from hand to hand, punching and kicking him until he was blinded by blood and pain. The boys jeered him with vicious anti-semitic taunts, yelling that he should have been gassed by the Nazis with all the other Jews, and that Jews were responsible for World War II. The beating left Petitioner with recurring physical problems, including a bad back. He was also deeply scarred emotionally, never fully dealing with his feelings of terror, helplessness and pain. He kept a newspaper clipping describing the incident on his bedside bureau all his adult life. He developed a passive-dependent personality disorder, exhibiting a powerful need to please and placate others.

Petitioner became the founder and president of a successful clothing import company. He traveled extensively to the Far East to seek out and purchase textiles. On many occasions, he participated in the common Asian custom among friends and business associates of transporting luggage or presents between Asia and the United States.[1] On May 3, 1983,

[1] At trial, Professor Sin-Ming Chiu, an expert in Chinese customs, testified that it is extremely common among the Chinese to request that a visitor bring packages back to the United States. If such a request is refused, the business or personal relationship will be at an end. He also testified that business cards are the universal means of identification among Chinese businessmen.

Petitioner arrived at a Holiday Inn in Philadelphia to retrieve a suitcase for a Chinese business associate. He identified himself by a halved business card and a Chinese phrase. He then walked over to the suitcase.

Two D.E.A. agents burst into the room, weapons drawn and pointed at Petitioner, shouting "Freeze!" Moments later, several other agents also appeared with their guns drawn.[2] Two of the agents were unusually large men; Petitioner is five feet 3 inches tall. As Petitioner recalled the arrest at trial, the agents shouted questions at him, made anti-Semitic slurs, accused him of importing heroin and told him he would be raped in jail and would never see his family again if he didn't "come clean." Stunned, helpless and terrified that he was about to be beaten, Petitioner began to relive the beating he'd experienced at age 13. He became desperate to please the agents, to do anything, say anything to prevent them from hurting him. His overpowering anxiety caused him to tell the agents whatever he thought they wanted to hear. Initially, he said he had come to pick up sweater samples. The agents rejected this explanation, telling him to try again. After a time, Petitioner said that the suitcase contained "number 3 cocaine" for a friend's personal use.[3] This excuse was rejected as well; the agents accused Petitioner of knowing that the suitcase contained heroin. Hours later, at the police station, after persistent accusations that he knew it was heroin, Petitioner agreed, and he kept on agreeing throughout the next few days.

Within two weeks, he began to receive psychiatric treatment. During the treatment, he again relived the boyhood beating,

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[2] There was a conflict between Petitioner's testimony and that of the government agents as to the number of agents who were in the room with guns drawn and aimed at Petitioner. The government contended that the number was only two; Petitioner insisted that at least five were involved.

[3] "Number 3 cocaine" does not exist. Dr. Robert L. Sadoff, one of Petitioner's psychiatrists, testifed at trial that Petitioner told him he made up the phrase, thinking of Tylenol 3 and Anacin 3.

and finally, on June 3, admitted to his psychiatrist that he had confessed falsely out of terror and then had been too ashamed to tell the truth. The psychiatrist advised him immediately to inform his counsel, which he did.[4]

On July 28, 1983, Petitioner moved to suppress the series of statements purporting to admit that he knew the suitcase contained heroin, on the ground that they were not voluntary. At the suppression hearing, two psychiatrists and a forensic clinical psychologist testified that Petitioner had a personality disorder, and that it was consistent with Petitioner's psychological makeup that, when arrested and surrounded by armed agents, he would relive the childhood beating and falsely confess, saying whatever he thought the agents wanted to hear. The psychiatric witnesses were cross-examined at length. The motion to suppress was denied.

Petitioner's trial began on September 12, 1983. He was tried with Phairat Ratanakakornklai, who brought the suitcase into the United States. The crucial issue at trial was whether or not Petitioner *knew* that the suitcase contained heroin. Petitioner's defense was essentially the same as at the suppression hearing: he was completely innocent of all charges and had confessed falsely due to the emotional stress of the arrest situation which caused him to relive a deeply traumatic incident from his past. Petitioner testified that he had no idea that the suitcase contained heroin. The psychiatric witnesses who had testified at the suppression hearing also testified. All three testified that Petitioner's "confessions" were false, and that Petitioner's unnatural fear of physical intimidation, stemming from the brutal

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[4] At trial, Petitioner testified at length about the beating incident in his past, his career, his arrest, and his psychiatric treatment (Trial Tr. Sept. 20, 1983, pp. 3-39). Two psychiatrists, Joshua Werblowsky and Robert L. Sadoff and a forensic clinical psychologist, Gerald Cooke, testifed to Petitioner's mental illness, their diagnoses, and to what Petitioner had told them of the relevant events, past and present (Trial Tr. Sept. 16, 1983, pp. 21-32, 42-51; Sept. 19, 1983, pp. 11-21). Copies of the trial transcripts will be furnished on request.

beating he received as an adolescent, caused him to tell the government agents whatever they wanted to hear as a way of preventing the physical harm he feared. They diagnosed him as suffering from a long-standing passive dependent personality disorder and a post-traumatic stress reaction. The government presented no medical experts.

During the government's closing argument, the prosecutor attacked the defense experts, urging that Petitioner "decided to develop a severe emotional disorder" only after being indicted (A. 6a). In response, Petitioner's counsel argued that the experts were well qualified and uncontroverted, noting that the government had not had Petitioner examined by a government psychiatrist (A. 7a).

Although the prosecutor had been aware of the defense position well before trial, and had herself cross-examined all three defense experts at the suppression hearing, she interrupted defendant's closing to object on the ground that Petitioner's counsel had not filed written notice pursuant to Fed.R.Crim. P. 12.2. She claimed that such notice was required because the defense was "either an insanity defense or mental disease" (A. 7a). Without further discussion, the District Court directed: "You are authorized in your rebuttal to point that out" (A. 7a).

In rebuttal, the prosecutor exploited the District Court's permission to the full, stating to the jury:

> First I would advise this jury *with the permission of the Court* that if you will recall in opening statements you were told that Mr. Wagman was going to come in here and bring before you psychiatrists, psychiatrists [*sic*], psychotherapists, psychologists and his counsel has suggested that gee, the Government should have done this. If the government didn't believe, if the Government this and that and we are back again to the power and the

might of the United States Government. There is only one hook in that and it is a hook that *you probably wouldn't know unless you spent sometime in law school or sometime in the Bar and practicing*. It is a hook that perhaps defense counsel has forgotten and that hook is that when you are going to produce psychiatric testimony the rules of the game, specifically Rule 12.2, says that you have to give prior notice on [*sic*] so that there is an opportunity to have your client examined, that you don't wait until you put 14 people in the box, swear them in and say, 'oh, by the way, we forgot, this man has developed a mental disorder within the last however many hours or days and here we come with three psychiatrists.'

Notwithstanding that the defendant forgot that that is the way the rule is supposed to work, you still have to evaluate the testimony of his hired experts against everything you have seen and heard and again I think perhaps you know maybe you will pick a favorite from among the three. The theme of all three, if you will recall, most succinctly put by Dr. Cooke again twice, truth is not what they are particularly concerned with, truth.

(A. 8a) (emphasis added).

After closing and prior to the court's instruction to the jury, defense counsel objected to the prosecutor's remarks. The court took no steps to correct its error, as compounded by the prosecutor's false and inappropriate closing argument. Petitioner was convicted.

On appeal, Petitioner argued that the District Court erred in permitting the prosecutor to misadvise the jury that defense counsel had violated Rule 12.2, and that Petitioner's entire defense was deeply prejudiced by the prosecutors remarks. Petitioner also argued that the prosecutor's comments per-

suaded the jurors to disbelieve the most crucial defense evidence and, in effect, told the jury that there were facts known to the prosecutor but not to the jury which would convince them of defendant's guilt. The Court of Appeals had "no doubt that it was error for the district court to allow the government to argue an essentially legal issue to the jury" (A. 3a). Nevertheless, the court concluded that because the prosecutor told the jury that it "still had " to evaluate the testimony of Petitioner's experts, and "under all the circumstances and upon the overwhelming evidence of guilt we conclude that the error did not affect defendant's substantial rights and was therefore harmless" (A. 3a-4a). One of the three judges found individually that the prosecutor's suggestion that the psychiatric defense theory was recently "concocted" was "highly questionable;" but concurred in the majority's conclusion on the ground that the prosecutor's conduct "did not contribute to the jury's judgment of conviction." (A. 4a.)

Reasons for Granting the Writ.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT IT WAS HARMLESS ERROR FOR THE U.S. ATTORNEY TO IMPUGN THE INTEGRITY OF DEFENSE COUNSEL AND IMPROPERLY ATTACK THE CREDIBILITY OF DEFENSE WITNESSES, THEREBY DEPRIVING PETITIONER OF A FAIR TRIAL.

A. *The Critical Factual Issue at Trial Was the Veracity of "Admissions" Which Petitioner Contended Were Falsely Made Due to a Personality Disorder.*

At Petitioner's trial, the sole issue was whether or not he knew that the suitcase he retrieved contained heroin.[5] There

[5] The three statutes under which Petitioner was charged, 21 U.S.C. §§ 846, 952, 963, all require the government to prove that the defendant *knew* that controlled substances were involved. *United States* v. *Restrepo-Granda*, 575 F.2d 524 (5th Cir.) *cert. den.*, 439 U.S. 935 (1978); *United States* v. *DeLaCruz*, 420 F.2d 1093 (7th Cir. 1970); *United States* v. *Glen-Archila*, 677 F.2d 809 (11th Cir.), *cert. den.*, 459 U.S. 874 (1982).

was no dispute that Phairat Ratanakakornklai, a man unknown to Petitioner, brought a suitcase containing heroin into the United States and contacted Petitioner and that Petitioner went to the Holiday Inn to pick up that suitcase. Petitioner's defense was straightforward: he had no idea the suitcase contained a controlled substance.[6]

To demonstrate Petitioner's knowledge, the government introduced a series of incriminating oral statements made at and around the time of his arrest.[7] Had the government not had these statements, it would have had to argue Petitioner's guilty knowledge solely through inferences from such circumstantial evidence as the fact of his arrival to claim the suitcase or his use of the Chinese custom of self-identification by means of a halved business card. With no direct evidence of knowledge, it is extremely doubtful whether the government's case would have been constitutionally sufficient.[8]

At trial, the three psychiatric witnesses testified that Petitioner suffered from a long-standing passive-dependent personality disorder, caused or exacerbated by a severely traumatic beating at age 13. As a result of this disorder, the circumstances surrounding his arrest caused Petitioner to relive the earlier trauma, and to become so terrified that he "confessed" falsely to prevent what he believed or imagined was about to be a recurrence of the earlier event.

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[6] Petitioner believed that the suitcase contained antiques which Paul Pan, a business associate, was bringing into this country.

[7] In his defense, Petitioner asserted that some of the statements attributed to him were never made; however, he admitted having made others. The statements at issue all involved admissions that Petitioner "knew" that the suitcase contained heroin.

[8] The government could not have proven Petitioner's knowledge by arguing that it could be presumed from proof of other elements of the crime. The government must prove every element of the crime beyond a reasonable doubt, including the requisite mental element. That burden is not met if the government does no more than prove other elements of the crime or additional facts not themselves establishing intent. *Sandstrom* v. *Montana*, 442 U.S. 510, 524 (1979).

Petitioner's credibility and the credibility of his expert witnesses were the cornerstones of his defense. There was no contradictory medical testimony, and not one witness who testified to Petitioner's alleged knowledge of the heroin. If Petitioner and his witnesses were believed, he would be acquitted. If, however, his witnesses were improperly discredited and his defense wrongfully characterized as a fabrication, then the jury could not evaluate fairly the experts' testimony, or weigh impartially all of the evidence. Yet this is precisely what happened.

B. *The District Court Permitted the Prosecutor to Impugn the Integrity of Defense Counsel, Undercut the Credibility of Defense Witnesses and Thereby Prejudice Petitioner's Defense.*

In her rebuttal, the prosecutor told the jury "with the permission of the Court" that defense counsel had violated "the rules of the game, specifically Rule 12.2," which says that "you don't wait until you put 14 people in the box, swear them in and say, 'oh by the way, we forgot, this man has developed a mental disorder within the last however many hours or days and here we come with three psychiatrists.'" (A. 8a). This statement was so profoundly and obviously untrue that it deserves to be called a deliberate falsehood.[9] It so fundamentally prejudiced Petitioner's defense as to rob him of his Sixth Amendment right to a fair trial.

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[9] As one Appeals Court judge noted, "The defense had presented the same theory and the same expert witnesses at the pretrial suppression hearing. The prosecutor represented the government at that hearing, and thus *was fully aware of the defense's theory well before trial.*" (A. 4a) (emphasis added). The prosecutor knew not only what the defense would be, but which individual witnesses would present it, and what they would say. Regardless of the applicability of the technical notice requirements of Rule 12.2, it is simply a falsehood to suggest that defense counsel waited until the jury was seated to make the government aware of Petitioner's psychiatric defense.

The prosecutor's comments were likely to give rise, in the average juror's mind, to at least three inferences: that Petitioner's counsel acted unethically; that Petitioner's defense was a recent fabrication and therefore unworthy of belief; and that the government could have effectively countered Petitioner's defense if it had adequate notice. Each inference is prejudicial; taken together, their cumulative impact is overwhelming.

The prosecutor first implied that Petitioner's counsel acted unethically, by violating Fed.R.Crim.P. 12.2, and by fabricating an unfounded defense. Neither charge is true.

Petitioner's counsel did not violate Rule 12.2. The version of the rule in effect at the relevant time simply did not apply to Petitioner's defense.[10] Yet the jury was told that counsel

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[10] The rule in effect at the time provided that written notice to the government was required only if the defendant intended either to rely on a defense of insanity or to introduce "expert testimony relating to a mental disease, defect, or condition bearing on the issue of whether he had the mental state required for the offense charged." Petitioner's defense fell into neither category. He did not contend that although he had committed the offense, mental illness obviated his responsibility for it. Rather, he argued that he did not commit the offense and that incriminating statements made when he was arrested were falsely made because of his irrational fears at the time. Rule 12.2 is not to be applied mechanistically; it does not apply, for example, to the psychological susceptibility of an asserted victim of entrapment. *United States* v. *Hill*, 655 F.2d 512, 518 (3d Cir. 1981).

A new version of the rule, effective August 1, 1983, broadened its application to testimony on any mental condition "bearing upon the issue of guilt." Under both rules, notice is to be given "within the time provided for the filing of pretrial motions." Petitioner's pretrial motions were filed July 28, 1983, when the older version of the rule was still in force. The government conceded in its brief on appeal that Petitioner's position "might have been cognizable" under the old rule, but argued that the new rule should have been applied, and that there was a violation of the new rule.

Whether the applicable rule was the old version or the new one is irrelevant. The issue presents precisely the type of technical, legal dispute which lawyers happily brief and argue at length — *to the court*. What is important is not whether defense counsel violated the rule — which he did not — but the fact that the jury was told in no uncertain terms that he had. The jury never heard Petitioner's side of the issue, and could only conclude that the prosecutor's misstatements of the law and insinuations against the propriety of counsel's conduct were justified. This conclusion could only be strengthened by the prosecutor's explicit invocation of the court's permission to make the misstatements.

had indeed broken a rule, and, as far as they knew, a critically important one.[11] The prosecutor's statement also fundamentally misstated the law by misdescribing its applicability.[12] The prosecutor further implied that counsel broke the rule *deliberately*, so that he could spring an unfounded defense on the government at the last moment, when the prosecutor had no time to prepare an appropriate and effective response. The inference is clear: defense counsel is not only incompetent, but unethical.

Comments which impugn counsel's integrity have consistently been found to be so prejudicial as to deny defendant a fair trial. Where a prosecutor implied that defense counsel concocted a defense of self-defense only after hearing the

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[11] Significantly, the government made no objection at trial to the testimony of Petitioner's three psychiatric defense witnesses. Both the old and new versions of Rule 12.2 provide that the penalty for failure to comply with the rule will be the court's discretionary exclusion of the expert testimony. Such exclusion is the sole penalty provided for. In this case, had the government moved to exclude, Petitioner would have had an opportunity to argue to the court why the rule was inapplicable. Whether the testimony was admitted or excluded, the jury would have been presented with a consistent, untainted defense.

Here, however, Petitioner suffered the worst possible scenario. He relied on the testimony of the psychiatric experts. Then the prosecutor was permitted to malign both Petitioner's counsel and the substance of his defense, but counsel had no opportunity to respond.

The District Court should have rejected the prosecutor's objection as untimely instead of providing its imprimatur to such one-sided, improper, and prejudicial argument.

[12] In telling the jury that Rule 12.2 notice is required "when you are going to produce psychiatric testimony," the prosecutor profoundly misstated the rule. Neither the old nor the new version require written notice every time psychiatric testimony is introduced at trial; rather, such notice is required only in specific, narrowly defined situations. To state that the rule applies *whenever* such testimony is to be introduced is to give the impression that counsel's duty under the rule must have been obvious, whereas in actuality the applicability of the rule to this case is a difficult and doubtful question. The prosecutor's mischaracterization implied that defense counsel acted in deliberate dereliction of a clear duty, an insinuation which intensified the prejudice against Petitioner.

government's case, and characterized defense witnesses as "last-minute witnesses," such comments were found to be "deliberately calculated to mislead the jury and to gain a guilty verdict through the use of facts not in evidence, and insinuations that [defendant], his attorneys and witnesses testifying on [defendant's] behalf were lying." *Angel* v. *Overberg*, 664 F.2d 1052, 1056 (6th Cir. 1981). The comments were held to have denied defendant a fair trial. *Id.* at 1056. *See also, United States* v. *McDonald*, 620 F.2d 559, 563-564 (5th Cir. 1980) (prosecutor's comment on the presence of defendant's lawyer during execution of a search warrant "struck at the jugular of [defendant's] exculpatory story, the essence of which was that there was no evidence to destroy," impugned the integrity of defense counsel, without basis in fact, as a means of inputing guilt to the defendant, and could not be considered harmless error); *Bruno* v. *Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983) (Prosecutor's remarks that defense witness changed testimony after hiring lawyer, although "intended ultimately to impute guilt to the accused . . . severely damage an accused's opportunity to present his case before the jury" and denied defendant "a fundamentally fair trial").

In this case, the prosecutor's comments were even more egregious than those cited above. By suggesting that counsel had waited until the jury was "in the box" to say "here we come with three psychiatrists" the prosecutor *deliberately lied.*[13] Even though her ultimate goal, as in *Bruno* v. *Rushen*, was to impugn guilt to Petitioner, the unavoidable result was to discredit defense counsel and to damage irretrievably his ability to present Petitioner's case to the jury. As the Ninth Circuit recently observed, "such tactics unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice." *Bruno* v. *Rushen*, 721 F.2d at 1195.

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[13] See footnote 9, *supra*.

The second major inference inherent in the prosecutor's remarks is that Petitioner's mental illness was recently fabricated ("within the last however many hours or days") and that his witnesses were therefore not credible ("here we come with three psychiatrists."). Where the improper statement strikes at the core of the defense, the error is clearly prejudicial. *U.S.* v. *McDonald*, 620 F.2d at 564, *U.S.* v. *Davis*, 546 F.2d 583, 594 (5th Cir. 1977). In this case, the core of Petitioner's defense was the existence of his mental illness and the credibility of his expert witnesses. The prosecutor's improper remarks were likely to eviscerate both in the jury's mind.

The characterization of Petitioner's defense as a recent fabrication was also a paradigmatic example of an improper assertion of personal knowledge outside the purview of the jury. The jury did not know, and should not know, when defense counsel chose its defense theory or contacted potential witnesses. Yet the prosecutor stated — *falsely* — that such decisions were made only after the jury was seated.[14] These are just the sort of improper assertions of personal knowledge which "carry with them the clear import that counsel knows something which the jury doesn't and this is an additional reason to condemn [the defendant]." *United States* v. *Bess*, 593 F.2d 749, 756 (6th Cir. 1979). Such assertions, coming from a government prosecutor, "are apt to carry much weight against the accused when they should properly carry none." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). *See also Angel* v. *Overberg*, 664 F.2d at 1055 (mischaracterization of defense witness as "last minute" is prejudicial because improper assertion of personal knowledge).

The third inference in the prosecutor's remarks is that had the government received "proper" notice, it would have coun-

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[14] See footnote 9, *supra*. The prosecutor also told the jury that it "probably wouldn't know [that counsel violated Rule 12.2] unless you spent sometime (*sic*) in law school or sometime (*sic*) in the Bar and practicing." (A. 8a.)

tered defense experts with its own experts, who would have demolished the credibility of Petitioner's medical testimony. It is highly improper for a prosecutor to imply, however subtly, that evidence of a defendant's guilt exists which was not presented. *United States* v. *Garza*, 608 F.2d 659, 663 (5th Cir. 1979); *United States* v. *Lamerson*, 457 F.2d 371, 372 (5th Cir. 1972); *United States* v. *Grossman*, 400 F.2d 951, 956 (4th Cir.), *cert. den.*, 393 U.S. 982 (1968). In this case, had the government wished to introduce its own psychiatrists, it had adequate actual advance notice to have done so. Yet the prosecutor argued, in effect, that defense counsel's misbehavior prevented the government from bringing in experts who would have punctured Petitioner's defense. Her comments invited the jury to speculate as to what government psychiatrists might have said, and to convict Petitioner on the basis of that imaginary evidence. One of the fundamentals of a fair trial in this country is the guarantee that a conviction will be based only on sufficient admissible incriminating evidence actually presented at trial. *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961); *Sheppard* v. *Maxwell*, 384 U.S. 333, 351 (1966). In this case the prosecutor insinuated that she knew things the jury did not know, and could have introduced evidence the jury had not seen. The fairness of Petitioner's trial was thereby destroyed.

The Court of Appeals erroneously concluded that the error here was harmless. As demonstrated above, Petitioner was profoundly prejudiced by the prosecutor's improper remarks. In rejecting Petitioner's claim, the Court of Appeals not only applied the wrong harmless error standard (see *infra*, pp. 19-22) but mischaracterized and trivialized the error. The court apparently dismissed the error as a relatively mild example of a prosecutor's "arguing an essentially legal issue to the jury." The prosecutor's misstatement of the law provided only one component of the manifest prejudice, however. She did more than simply wander out of the jury's province of fact into the

court's domain of law; she improperly undercut the heart of Petitioner's defense. By the time she had finished, the fundamental fairness of Petitioner's trial was permanently damaged.

The Court of Appeals' error in underestimating the gravity of the prejudice here was compounded by its apparent belief that any damage done had been repaired when the prosecutor told the jury that it "still had" to evaluate the testimony of Petitioner's medical experts. Such a throwaway comment can hardly be said to have neutralized the error. The court gave no instructions to disregard the prosecutor's improper comments, and took no action of any kind to mitigate their impact. To the contrary, the jury was informed that the prosecutor spoke "with the court's permission."

The prosecutor's statement that the jury still had to evaluate the defense experts did not, and could not mitigate the prosecutor's profound attack on the integrity of defense counsel, a separate attack which also was never refuted or corrected by the court. In *United States* v. *McDonald,* the prosecutor told the jury that he intended no reflection on the ethics of defense counsel by commenting on the presence of such counsel in the defendant's home during the unproductive execution of a search warrant. The Fifth Circuit held such "sincere statements" insufficient to correct the errors: "Unfortunately, it is difficult, if not impossible, to sanitize the comments so as to remove the taint. Inherent in the comments is the barb that the lawyer [acted unethically]. The comments affected the fairness of McDonald's trial." 620 F.2d at 564. In this case, where no effort whatsoever was made to mitigate the taint, the court's conclusion that the error was harmless cannot be justified.

II. The Court Below Erred in Failing to Apply the Harmless Error Standard for Constitutional Error.

The Court of Appeals had "no doubt" that the District Court committed error in permitting the government to "argue an essentially legal issue to the jury" (A. 3a). The error was deemed harmless, however, because it "did not affect defendant's substantial rights" (A. 4a). An individual judge also found the prosecutor's conduct "highly questionable," but concluded that "it is 'highly probable' that the prosecutor's conduct 'did not contribute to the jury's judgment of conviction.'" (A. 4a).

In concluding that the errors were harmless, both the court and the individual judge expressly applied the standard for non-constitutional rather than constitutional error. Because the errors here were clearly of constitutional magnitude, in that they affected Petitioner's Sixth Amendment rights to counsel and to a fair trial, the standard applied by the court below was incorrect. Had the proper standard been applied, the error would have been deemed harmful and Petitioner's conviction reversed.

Where an error is constitutional, the affirming court must determine that it was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 24 (1967). The test has also been phrased as whether "there is a reasonable possibility that [the constitutional error] might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963). "Only when it can be said that no such possibility exists can a court conclude that the error was harmless." *United States* v. *Molt*, 615 F.2d 141, 145 (3d Cir. 1980). Where the error is constitutional, there is a presumption of prejudice. *Anderson* v. *Warden*, 696 F.2d 296, 300 (4th Cir. 1982). The burden is squarely on the government to demonstrate that the error did not contribute *in any way* to the conviction of the defendant. *Eberhardt* v. *Bordenkircher*, 605 F.2d 273, 278 (6th Cir.

1979). Where the error is non-constitutional, the standard is somewhat less severe. The reviewing court need only find that it is "highly probable that the error did not contribute to the judgment." *Government of Virgin Islands* v. *Toto*, 529 F.2d 278, 284 (3d Cir. 1976).

As the Third Circuit has emphasized, the two tests are far from identical. "The 'high probability' standard is different from the 'reasonable doubt' or 'reasonable possibility' standard of appellate review used to determine the harmlessness of constitutional error." *United States* v. *Jannotti*, 729 F.2d 213, 220 n.2 (3d Cir.), *cert. denied*, 53 U.S.L.W. 3269 (1984). "High probability" requires the court to have a sure conviction that defendant was not prejudiced. But the court "may be firmly convinced that the error was harmless without disproving every 'reasonable possibility of prejudice.'" *Id.*, citing R. Traynor, *The Riddle of Harmless Error*, 33-37, 44-45 (1970). Justice Traynor's influential essay established three possibilities for harmless error: *more probable than not* that the error did not contribute to the judgment; *highly probable*; and *almost certain*. Traynor, *supra*, at 35. The middle ground, he explained, is the standard used for non-constitutional error, the "almost certain" test is the test "prescribed by the United States Supreme Court when error is of constitutional dimension." *Id.* Thus, an error which is harmless if non-constitutional may well be harmful and reversible if every "reasonable possibility" of prejudice must be eliminated through use of the stricter constitutional standard.

In this case, the error was manifestly constitutional. "That point at which improper argument amounts to a constitutional deprivation can only be defined by reference to the totality of the circumstances of the particular case." *Summitt* v. *Bordenkircher*, 608 F.2d 247, 253 (6th Cir. 1979), *aff'd* 449 U.S. 341 (1981); *see also, e.g. Donnelly* v. *DeChristoforo*, 416 U.S. 637, 645 (1974). The circumstances here intensified rather than mitigated the error's adverse impact on the jury.

Significantly, the jury was told that the prosecutor's remarks were made "with the permission of the court." Defense counsel objected before the court instructed the jury, but no cautionary instructions or admonitions to disregard were given. Thus, the remarks reached the jury imbued not only with the extra weight ordinarily accorded the U.S. Attorney, *Berger* v. *United States*, 295 U.S. at 88, but with the added aura of judicial approval. It is often said that prompt judicial instruction can neutralize an error's prejudicial effect. *See, e.g., United States* v. *Carter*, 613 F.2d 256, 261 (10th Cir. 1979); *United States* v. *Benson*, 487 F.2d 978, 981 (3d Cir. 1973). The weight of judicial authority can work just as powerfully in the opposite direction, where as here, the judge explicitly sanctioned the prosecutor's misconduct.

The error in this case also cut to the heart of Petitioner's defense. The prosecutor's comments clearly implied that Petitioner's psychological attack on the veracity of his admissions was a recent fabrication presented through unbelieveable witnesses. Yet the veracity of those admissions was the critical contested issue in the case.[13] Where the prosecutor's improper remarks are "designed and calculated to make petitioners' version of the evidence worthless" the error is both constitutional and harmful. *Chapman* v. *California*, 386 U.S. at 26. *See also, United States* v. *McDonald*, 620 F.2d 559, *U.S.* v. *Bess*, 593 F.2d 749.

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[13] In rejecting Petitioner's claim, the Court of Appeals characterized the evidence against Petitioner as "overwhelming." (A. 4a). Yet the evidence of Petitioner's knowledge, a necessary element for conviction on all counts, derived *solely* from the admissions which Petitioner's defense aimed to discredit. Consequently, the government's evidence can only be termed "overwhelming" if the admissions are accepted as true. In assessing the harmfulness of the error here, the court should have recognized that the prosecutor's remarks tended *improperly* to reinforce the alleged truthfulness of the admissions. If the error had not been made, Petitioner's challenge to the veracity of the admissions would have been immeasurably stronger, and the evidence could not have been termed "overwhelming."

Because the errors committed in this case by the prosecutor and by the District Court were clearly of constitutional magnitude, the Court of Appeals erred in measuring them against the standard for non-constitutional harmless error. Because, under either standard, the errors were overwhelmingly prejudicial, the decision of the Court of Appeals should be reversed.

Conclusion.

This is not a case in which a guilty defendant is seeking to suppress a confession on the ground that it was obtained in violation of a prophylactic rule. To the contrary, an innocent defendant is seeking to have an unbiased jury decide on the truth or falsity of admissions which he — and three distinguished scientific witnesses — testified were false. In this case, Petitioner was denied his constitutional right to a fair trial because of the compounded errors of the prosecutor and the trial court.

Respectfully submitted,

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Appendix.

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United States Court of Appeals for the Third Circuit

No. 84-1006

UNITED STATES OF AMERICA

v.

ROBERT WAGMAN
APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. Crim No. 83-206-01

Argued: June 15, 1984
Before SEITZ, *Circuit Judge*, STEWART, *Associate Justice** and ADAMS, *Circuit Judge*
(Opinion Filed: August 31, 1984)

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OPINION OF THE COURT

PER CURIAM.

The defendant, Robert Wagman, appeals his sentence after conviction by a jury on various charges of conspiring to import heroin, 21 U.S.C. § 963; importation of heroin, 21 U.S.C. § 952; and attempted possession of heroin with intent to distribute, 21 U.S.C. § 846.

Defendant first contends that the district court committed error in excluding certain expert testimony. A part of defendant's defense strategy was to show that he was so wealthy that he had no motive to deal in heroin. He, therefore, unsuccessfully sought to have an accountant testify as to his income and net worth.

The short answer is that the defendant himself testified adequately as to his net worth and income. It is therefore difficult to understand how the accountant's testimony as to the same subject matter would have been helpful to the jury. There is no suggestion that the evidence was so complex that an expert was required to aid the jury's understanding. Therefore, it was not an abuse of discretion for the trial judge to determine that the expert testimony was inadmissible.

Defendant next contends that the district court committed error in permitting the government to argue in its summation to the jury that the defense had violated Rule 12.2 of the Federal Rules of Criminal Procedure by not giving advance notice of an intention to present exculpatory psychiatric testimony. This issue has a rather unusual procedural background.

Prior to the trial the defense unsuccessfully attempted to suppress defendant's inculpatory statements following his arrest by showing that defendant suffers from a "passive-dependent personality disorder" that caused him to confess falsely in order to avoid stress and physical intimidation at the hands of government agents. At trial the defense presented similar psychiatric testimony without objection by the government. However, the government objected to defense counsel's reference to the testimony during his summation and requested a curative instruction, on the ground that the defense had violated Rule 12.2 of the Federal Rules of Criminal Procedure by not giving advance notice of the intention to present exculpatory psychiatric testimony.

The court failed to give a curative instruction but permitted the government to point out what it claimed was defendant's violation of Rule 12.2 in its rebuttal. This the government did. Before the court gave its jury instructions the defense objected to the reference to the Rule 12.2 violation in the government's rebuttal but did not request any relief. The district court tacitly rejected the objection. On appeal, defendant argues that the government's reference to Rule 12.2 was prejudicial and warrants a new trial.

We have no doubt that it was error for the district court to allow the government to argue an essentially legal issue to the jury. However, the prosecutor did not tell the jury to ignore the psychiatric testimony. Indeed, the prosecutor told the jury that it "still had" to evaluate the testimony of defendant's hired experts, and the defendant's counsel argued forcefully as to

the value of such testimony. Under all the circumstances and upon the overwhelming evidence of guilt we conclude that the error did not affect defendant's substantial rights and was therefore harmless. Fed. R. Crim. P. Rule 52(a).[1]

The judgment of the district court will be affirmed.

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[1] Judge Adams considers the prosecutor's conduct highly questionable, particularly her suggestion to the jury that the psychiatric defense theory had been concocted "within the last however many hours or days." App. at 76. The defense had presented the same theory and the same expert witnesses at the pretrial suppression hearing. The prosecutor represented the government at that hearing, and thus was fully aware of the defense's theory well before trial. Nevertheless, even if this suggestion improperly called into question Wagman's explanation of the confession, Judge Adams' careful review of the record persuades him that, given the overwhelming evidence to support the conviction, it is "highly probable" that the prosecutor's conduct "did not contribute to the jury's judgment of conviction." United States v. Jannotti, 729 F.2d 213, 219 (3d Cir. 1984), citing Government of the Virgin Islands v. Toto, 529 F.2d 278, 284 (3d Cir. 1976). Therefore, he concurs with the majority's conclusion.

United States Court of Appeals for the Third Circuit

No. 84-1006

UNITED STATES OF AMERICA

v.

ROBERT WAGMAN,

Appellant.

(Crim. No. 83-206-01 - E.D. of Pa.)

Present: ALDISERT, *Chief Judge*, STEWART, *Associate Justice**, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, and SLOVITER, *Circuit Judges*.

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no other judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Seitz

Circuit Judge

Dated: October 4, 1984

*The Honorable Potter Stewart, Associate Justice, United States Supreme Court (retired) sitting by designation.

Appendix B.

TRIAL TRANSCRIPT,

Ms. Damirgian

Mrs. Wagman, the lawyers, with their good intentions had tipped off Mr. Pan and at that point Robert Wagman had nobody left to trade away. And so Robert Wagman decided to develop a severe emotional disorder. He decided that it was time to think about what had happened to him when he was 14 years old. He decided it was time to dredge it up and bring it out and offer it to the doctors and to see if it could fly.

What happened to Robert Wagman and we will assume for purposes of this that it was true, what happened to Robert Wagman when he was 14 should not happen to anybody for any reason and yet it happens. People take a beating for reasons that have nothing to do with who they are but with what they are. And it is not right. It is not an excuse, however atrocious it may have been, to turn around 36 years later and get yourself involved in the distribution of heroin. It is not an excuse to tell reasonable people and say, "Cut me a break. I did it. I didn't do it. I might have done it. It is all because of my emotional problems."

* * * * * * * * *

Mr. Marino

Now, Miss Damirgian has also called in effect the doctors liars. She has said this man concocted his problem, concocted meaning the doctors are either liars or they are stupid or they will fall for him for this concoction. Now, you heard the doctors. You heard their background. Bob Sadoff, Gerald Cooke, have been employed by the United States Government to evaluate. They have testified to a prosecution. Obviously they are well-respected human beings as well as doctors. But yet their uncontradicted testimony, uncontradicted, uncontroverted testimony is now assailed. Well, if you didn't believe him or you thought it was a concoction, why didn't you have Mr. Wagman examined by your psychiatrist who could disprove what the other psychiatrist would say? It wasn't done.

MS. DAMIRGIAN: Objection. May we see you at Side-Bar?

THE COURT: Yes indeed.

(Side-Bar Conference as follows:)

THE COURT: Yes?

MS. DAMIRGIAN: I would ask that the Court give a curative court. As this Court is well aware, Mr. Marino, Mr. Madden, never filed notice under 12.2 of any type of psychiatric examination being given for their client —

MR. MARINO: That is —

MS. DAMIRGIAN: — it is either an insanity defense or mental disease. They have no notice to the Government psychiatric, once the jury had been sworn and opening statement made.

THE COURT: You have a rebuttal, you are authorized in your rebuttal to point that out.

MS. DAMIRGIAN: Point that out, fine.

THE COURT: Yes.

(Side-Bar Conference concluded.)

Ms. Damirgian

THE COURT: You may rebut now.

MS. DAMIRGIAN: First I would advise this jury with the permission of the Court that if you will recall in opening statements you were told that Mr. Wagman was going to come in here and bring before you psychiatrists, psychiatrists, psycho-therapists, psychologists and his counsel has suggested that gee, the Government should have done this. If the Government didn't believe, if the Government this and that and we are back again to the power and the might of the United States Government. There is only one hook in that and it is a hook that you probably wouldn't know unless you spent sometime in law school or sometime in the Bar and practicing. It is a hook that perhaps defense counsel has forgotten and that hook is that when you are going to produce psychiatric testimony the rules of the game, specifically Rule 12.2, says that you have to give prior notice on so that there is an opportunity to have your client examined, that you don't wait until you put 14 people in the box, swear them in and say "oh, by the way, we forgot, this man has developed a mental disorder within the last however many hours or days and here we come with three psychiatrists."

Notwithstanding that the defendant forgot that that is the way the rule is supposed to work, you still have to evaluate the testimony of his hired experts against everything you have seen and heard and again I think perhaps you know maybe you will pick a favorite from among the three.